

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA
and ASSEMBLY OF FIRST NATIONS

Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

ATTORNEY GENERAL OF CANADA
(Representing the Minister of Indian Affairs and Northern Development)

Respondent

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY
WRITTEN SUBMISSIONS ON SECTION 14.1 RETALIATION ALLEGATIONS

PART I

INTRODUCTION

1. The First Nations Child and Family Caring Society (“the Complainant” or “the Caring Society”) and its Executive Director, Dr Cindy Blackstock, are well known for their research and evidence-based advocacy for improved child welfare outcomes for First Nations children. At one time, the Respondent regularly consulted the Complainant and Dr Blackstock for their expertise in this area. But after the Caring Society filed the present complaint in February 2007, that collaboration abruptly ceased.

2. Over the ensuing years, the Respondent not only deemed the Caring Society's Executive Director to be *persona non grata*, it systematically and surreptitiously monitored her appearances and activities, including her communications with others on her personal Facebook page, and repeatedly violated her privacy, all with the intent of somehow undermining her by fishing for adverse information. The Complainant submits that this conduct constitutes retaliation contrary to section 14.1 of the *Canadian Human Rights Act* ("Act"), and that the retaliation complaint should be upheld with appropriate remedies ordered.

PART II EVIDENCE

Pre-Complaint History

3. Dr Cindy Blackstock testified about the relationship between the Caring Society and the Respondent (being Aboriginal Affairs and Northern Development Canada, or "AANDC"¹) prior to the complaint being filed in February 2007. The Caring Society was actually created in 1999 with funds from the Respondent. The Caring Society and Dr Blackstock played a major collaborative role with the Respondent in leading the Wen:de research from 2002 until 2005. After the final Wen:de final report, Dr Blackstock was invited in 2006 to summarize the findings to a Privy Council Office Committee. The relationship between the Respondent and the Caring Society was strong.

4. Since the needs of First Nations children were so pressing, and the research showing the gaps in child welfare was so clear, the Caring Society filed a human rights complaint in February 2007. Dr Blackstock said that she

¹ Some references to AANDC herein may actually be the predecessor department INAC.

became deeply concerned about the delays in implementing the Wen:de recommendations, and the impact it was having on kids every day.

5. There is no evidence that the Respondent carried out any kind of special monitoring of Dr Blackstock prior to the complaint. Dr Blackstock testified that she made *Privacy Act* requests for information prior to t 2007, and did not receive any documents that would suggest the Respondent followed or monitored her in any way.

Negative Attitude Towards Caring Society's Executive Director

6. There was clear evidence that, after the complaint was filed, the Respondent's officials no longer wanted to communicate with Dr Blackstock, or were reluctant to do so. For example, in 2008 and 2009 AANDC officials expressed concerns about whether they should be responding to any correspondence from Dr Blackstock. There is no question this was motivated by the human rights complaint, as one Assistant Deputy Minister expressly stated, "Given the Human Rights Complaint, I am not sure [Minister] should be corresponding with Ms. Blackstock at all."

Letter dated April 25, 2008 from C. Blackstock to M. Wernick, with handwritten comment about whether or not to reply [Exhibit C-1, Tab 2]

Handwritten "ADM Comments" [Exhibit C-1, Tab 3, ATIP page 000147]

7. Documents introduced as exhibits in the hearing also demonstrated that many of the Respondent's officials held negative views about Dr Blackstock. While the Respondent is always careful to publicly describe and recognize Dr Blackstock as a well-respected scholar in her field, these internal government documents revealed rude and disrespectful comments by many different officials about Dr Blackstock. Reporting on a presentation by Dr Blackstock in New Brunswick in 2009, AANDC official Joe Behar described it derisively as "the Cindy Blackstock show", commenting that "she rattled through some general

statistics (or gave the impression of doing so) before whisking away to the airport, mission accomplished.” In one email in 2011, an AANDC researcher writes, “CB (Cindy Blackstock) did another interview. Girl is on a role!” In another email, Dr Blackstock is described mockingly as “Our dearest friend”.

Email dated October 2, 2009, from J. Behar to several others [Exhibit C-1, Tab 5]

Email dated October 27, 2010 from K. Ford to E. Reza [Exhibit C-1, Tab 19, ATIP page 001025]

Email dated October 13, 2010 from K. Ford to E. Reza [Exhibit C-1, Tab 19, ATIP page 001075]

8. Sometimes these comments were directed to many other government officials, but there is no indication that anyone objected or suggested the communications were inappropriate and unprofessional (which they most certainly were.) As further evidence below shows, these kinds of views permeated AANDC, which is probably why no one raised concerns about the tone of these communications.

Refused to Consider Dr Blackstock for BC Working Group

9. In 2008, the Respondent formed a Working Group in British Columbia with First Nations organizations to develop and implement a new Enhanced Funding Formula. Dr Blackstock testified that she was told that, at one of the early meetings, Mary Teegee from the Carrier Sekani Family Services suggested that the Working Group should retain Dr Blackstock as a consultant, given her background and expertise in the area. According to the evidence of the Respondent’s own witness, Linda Stiller, this recommendation was immediately opposed by AANDC.

10. Stiller testified that she was aware of the human rights complaint, but maintained that this did not motivate her decision. Instead, Stiller said that

she did not want Dr Blackstock to be a consultant for the Group because she had been critical of the new Alberta funding model, which is what BC was going to follow. However, Stiller later admitted that she did not know Dr Blackstock's specific criticisms. She also did not bother to check the Caring Society's website, nor did she contact Dr Blackstock to discuss her views before discounting her outright as a consultant. This suggests Stiller's stated reason was pretextual.

11. Stiller later testified that "there was no way we were taking the Alberta model", but rather would just rely on that process to develop a "made in BC model". In that context, it is unclear why Dr Blackstock should be dismissed simply because she did not support the Alberta funding model. (Surprisingly, Stiller testified that she was unaware that the Auditor General of Canada had also criticized the Alberta funding model in her 2008 report, although she claimed to be familiar with the report.)

12. The Working Group ended up hiring someone named Jeffrey Lyons as a consultant instead of Dr Blackstock. Stiller testified that she was aware that Lyons was from Manitoba and acknowledged knowing that Dr Blackstock was from BC and had worked for some time on child welfare in BC. Nevertheless, she felt that Lyons was a better choice. The Complainant submits that, given Dr Blackstock's well know and well-respected expertise in the field, and her particular knowledge of B.C., it made no sense to pass her over as a consultant in favour of someone from out of province. The motivation was the complaint.

13. Stiller acknowledged that the human rights complaint was discussed regularly in her meetings with National Headquarters. By 2009, Stiller was also on the distribution list for emails about Dr Blackstock's media appearances. This evidence further corroborates that Stiller was fully aware of, and wary of, Dr Blackstock's involvement in the present human rights complaint.

Email dated November 24, 2009, from N. Thornton to L. Stiller and many others [Exhibit C-1, Tab 14, ATIP page 000073]

Chiefs of Ontario Meeting at the Minister's Office

14. On December 9, 2009, Dr. Blackstock was invited by the Chiefs of Ontario to attend a meeting with David McArthur, a special assistant to the Minister for AANDC. The meeting was about cuts to child welfare funding in Ontario and was scheduled to take place in the offices of the Minister. Blackstock testified that she was one of several individuals who had been invited by the Chiefs to attend the meeting as technical aids.

15. Dr Blackstock testified that, upon her arrival to the AANDC office, Mr. McArthur entered the reception area to allow each guest to enter the meeting room. He stood by the door of the meeting room and asked each person to introduce themselves. Most of the attendees entered the room without incident until Dr. Blackstock identified herself. Mr. McArthur blocked her way and told Dr. Blackstock that he was aware that she had "other issues" and she would not be allowed in the meeting. He suggested those issues could be discussed another time. Dr Blackstock and Chief Randall Phillips (as he then was) both made it clear that she was present to provide technical advice to Chief Phillips on the topic at hand, namely issues related to cuts to funding in Ontario, and not to discuss the human rights complaint. McArthur remained firm that Dr Blackstock would not be allowed in the room, and if the Chiefs insisted he would cancel the meeting. Chief Phillips and Mr McArthur raised their voices as the discussion lasted a few minutes.

16. Dr Blackstock was embarrassed by the awkward situation. She advised Mr McArthur and Chief Phillips that she would sit in the waiting area. As she did so, a security guard conspicuously stood across from her for the entire time. Dr Blackstock found that the presence of the security guard to be demeaning and

humiliating. It compounded the embarrassment she felt about being excluded from the meeting.

17. The evidence (oral and documentary) indicated that five people were expected at the meeting, but approximately 10 or 11 people showed up, including Dr Blackstock. While there were many people present who were not on the invite-list, only Dr Blackstock was excluded from the meeting. This was confirmed by Mr McArthur in questions from the Chair.

Emails dated December 8 and 9, 2009, with list of invitees and attendees [Exhibit C-1, Tab 6]

18. For his part, Mr Phillips testified that he wanted Dr Blackstock present due to her knowledge on statistics, funding levels, and so on. He also testified that these kinds of meeting are arranged from time to time (i.e., meetings government officials with no significant preparation or notice.) He said he had attended many such meetings in over 30 years of dealing with government officials at all levels and had never witnessed someone singled out and excluded from a meeting.

19. Mr McArthur testified that he did not want Dr Blackstock in the meeting because he was not briefed about her. He explained that typically when he attends meetings he receives in advance a full briefing package on all the attendees. However, under questioning from Member Lustig, Mr McArthur admitted that there were no pre-departmental consultations or briefings on any of the Chiefs who were actually invited to the meeting. This reveals Mr McArthur's explanation about requiring a briefing as pretextual.

20. Dr. Blackstock testified that she not only found this experience demeaning on a personal level, it had an impact on the ability of the Caring Society to perform its work. The Caring Society's entire purpose is to provide support, research and other assistance to First Nations representatives and

agencies regarding child welfare issues. When others see that federal government officials will not deal with Dr Blackstock, it completely undermines the organization's ability to fulfill its important mandate.

21. Dr Blackstock wrote a letter to the Minister of AANDC to express her feelings about the incident. In response, she received a letter from the Minister's Chief of Staff, Laurie Throness. Mr Throness provided the following explanation about the incident: "Inasmuch as you were not originally listed as one of the participants, and in keeping with our practice of prior briefing, we felt that meeting with you at that time was not appropriate." However, the evidence shows that this explanation was completely pretextual as other people who were not invited were allowed in the meeting, and there was no prior briefing on any of the individuals who were formally invited to the meeting.

Letter dated December 15, 2009 from C. Blackstock to C. Strahl [Exhibit C-1, Tab 8]

Letter dated January 29, 2010 from L. Throness to C. Blackstock [Exhibit C-1, Tab 11]

Monitoring Cindy Blackstock Appearances

22. Dr Blackstock obtained numerous documents under the *Privacy Act* which showed that the Respondent was closely following her professional activities. Government officials reported back on any conferences presentations she made, her media interviews were transcribed and widely circulated within AANDC, and information was solicited from other governments about their meetings with her.

Exhibit C-1, Tabs 17, 19 and 20

23. The Respondent suggested that it was gathering this information on Dr Blackstock because it was simply trying to monitor and analyze stakeholders

and interested parties who speak on matters related to AANDC's policies, programs and services. However, Dr Blackstock testified that she could find no evidence that the Respondent was gathering information about her speeches and presentations prior to filing the complaint.

24. There was also no explanation about emails that originated with University of Alberta faculty, migrated to Alberta government officials, and then was forwarded to federal government officials. That document suggests that the Respondent's officials were inquiring with provincial government officials about Dr Blackstock's activities, and asking them to share information about her. The Respondent did not call any witnesses to explain the document or provide an alternate explanation.

Email chain from November 1, 2011 to November 4, 2011 [Exhibit C-1, Tab 19, ATIP page 000425]

25. Perhaps even more disturbing, Dr Blackstock obtained documents that showed the Respondent's surveillance was international in scope and was collecting information on a trip she made to Australia in 2010. The Respondent possessed a media statement on a speech Dr Blackstock made in Alice Springs, Australia, and a summary of the speech. It is unknown who prepared the summary or how the Respondent obtained the information. Did it ask someone to surveill Dr Blackstock in Australia? The question is unanswered, as the Respondent did not call any witness to explain the troubling documents. Dr Blackstock testified that she found these documents very disturbing as it suggested the Respondent was prepared to go to any lengths to keep tabs on her.

Exhibit C-1, Tab 13

26. In fact, the Respondent was so intent on monitoring Dr Blackstock that some documents would even remark if she was not present at an event. This

suggests that the Respondent's scrutiny of Dr Blackstock was such that it was proactively trying to identify any event where she might even potentially appear. Again, Dr Blackstock found the prospect of such intense surveillance to be extremely disturbing.

Email dated February 7, 2011 from I. Ketcheson to M. Carlea and M. Pesant ("Ms Blackstock is not listed on agenda.") [Exhibit C-1, Tab 17, ATIP page 000033]

Facebook Surveillance or "Creeping"

27. Dr Blackstock testified that she was very upset to discover that, for a significant period of time, AANDC and Department of Justice officials were monitoring her personal Facebook page. The Caring Society maintains its own Facebook page, and there are other Facebook pages for different campaigns by the Caring Society, such as, e.g., I Am A Witness or Shannen's Dream. Dr Blackstock testified that these are 'corporate' public Facebook pages and she is happy to see as many visitors as possible on those sites. However, Dr Blackstock also keeps her own personal Facebook site that she does not want simply anyone to observe.

28. Dr Blackstock testified that Facebook changed or re-set its privacy settings at one point which allowed 'non-friends' to access her personal Facebook site. She was unaware of this and when she learned about it she made sure her Facebook settings were set on a high level of privacy. During this inadvertent 'open' period, different officials from AANDC and Justice regularly monitored Dr Blackstock's personal Facebook page. In February 2010, Krista Robertson from AANDC and a Justice official separately applied for and received approval to access Dr Blackstock's Facebook page from government computers. According to the request form, officials wanted to monitor the

Facebook page because Dr Blackstock was posting “sensitive information” about the case.

Website Access Requests [Exhibit C-1, Tab 12]

Email from E. Anderson to D. Ricard, dated November 17, 2011 [Exhibit C-1, Tab 18]

29. Other internal documents indicated that Dr Blackstock’s Facebook page was being monitored to discover if she had “other motives” for pursuing the complaint.

Email dated November 10, 2011 from K. Glowinski to M. Levesque [Exhibit R-4]

30. It is unclear how AANDC official Krista Robertson knew what was on Dr Blackstock’s personal Facebook page before she requested permission to formally access it. The obvious inference is that some officials were monitoring Dr Blackstock’s personal Facebook page for some time before February 2010. Ms Robertson made the February 2010 request, but the Respondent did not call her to testify. Instead, she observed the Tribunal’s proceedings from the gallery while Ms Natalia Strelkova, who only started accessing the site in March 2010 for AANDC, testified instead.

31. The Respondent’s officials would copy information from Dr Blackstock’s Facebook and disseminate widely by email. Some of the information reflected personal comments and messages from individuals, including children. There was no attempt to obtain the consent of those individuals, nor was there any effort to conceal their identities, including the minors, before the information was circulated.

Exhibit C-1, Tab 15

32. While Dr Blackstock would sometimes post information about her work and the human rights complaint, there was also information posted on her Facebook about her personal activities and private life. For the most part, it seems that government officials did not copy this more private information, but they were clearly viewing it. AANDC official Natalia Stelkova testified that she tried to skim information that was more personal in nature and would “not pay attention” to it. She did copy a message from a friend of Dr Blackstock who commented on her baking cookies, as she suggested it might be relevant. But there is no question that she viewed information that is even more personal than is reflected in the documentary records. Although no one from Justice testified, individuals there would also have viewed more personal information about Dr Blackstock.

33. Ms Stelkova testified that she accessed Dr Blackstock’s page by using her own personal Facebook identity. Stelkova testified that she felt accessing Dr Blackstock’s Facebook was acceptable because the privacy settings were low and allowed her access. Yet when Dr Blackstock changed her privacy settings to be more stringent, Ms Stelkova testified that she continued to make attempts to access Dr Blackstock’s Facebook page.

34. David King, an IT professional, also testified for the Respondent on this issue. He testified that Facebook access requests are not uncommon, but in his 15 years in the job he has never seen or even heard of a request for access to monitor an individual’s personal Facebook page. He described it as “exceptional”.

Indian Status Records and Mishandling of Privacy Complaints

35. Dr Blackstock was very distressed when she received print-out copies of her ‘Registered Indian Record’ pages when she made requests for information under the *Privacy Act*. In her requests, she never asked for these records, and moreover they were not produced with every request, which suggested they

were printed for some other purpose. The Status records contained very personal information about Dr Blackstock as well as immediate family members.

Exhibit C-1, Tab 1

36. Since the production of the records were inconsistent, and were received among many other documents showing that Dr Blackstock was being surveilled, she was very upset and suspicious. She also recalled the tactics of the Respondent's legal counsel in this case, where she was cross examined on her religious beliefs and whether she had ever personally been under child welfare care. It appeared that the Respondent was attempting to dig up information on her personal life simply because she was the Executive Director of an organization that filed a human rights complaint.

Transcript of Cross Examination of C. Blackstock, conducted February 23, 2010, pages 2-3 and 10-11 [Exhibit C-1, Tab 21]

37. No evidence ever surfaced to suggest the Registered Indian Records were produced and shared with the Respondent's counsel for use in this litigation. However, when Dr Blackstock publicly raised concerns about the Records, an AANDC official, Monica Fuijusshot, accessed Blackstock's Indian Record again without a valid purpose. Later, the Respondent sent the entire package of ATIP documents to the Privacy Commissioner before a complaint had been filed and without Dr Blackstock's consent. The Privacy Commissioner quite appropriately returned the documents immediately to the Respondent.

Exhibit R-12, Tabs 61 and 62

38. Ms Fuijusshot testified for the Respondent on this issue. She was the one who accessed the Respondent's Status records and recommended that it be

sent to the Privacy Commissioner. She also carried out “an investigation” of Dr Blackstock’s public complaints, but acknowledged in her testimony that she never attempted to contact Dr Blackstock. Fuijusshot admitted to being aware of the human rights complaint and that she did not contact Dr Blackstock due to the outstanding case. It also appears that she treated Dr Blackstock’s situation differently than others because she proactively contacted the Privacy Commissioner about it. The evidence showed that all of this differential treatment was due to Dr Blackstock’s involvement in the human rights complaint.

39. Linda McLenechan testified for the Respondent that there is a high level of protection for Indian Registration records. She testified that these sensitive records are only access at the request of the concerned person, and usually only for inquiries related to benefits, adoption or registration.

PART III

LAW AND ARGUMENT

Legal Test for Retaliation

40. Section 14.1 of the *CHRA* prohibits retaliation, or threat of retaliation, against any person who files a human rights complaint. The purpose is to ensure people feel confident that they can exercise their rights under the Act without fear of reprisal. It offers protection to complainants and acts as a deterrent to those may take action against someone who has filed a complaint.

Canadian Human Rights Act, section 14.1

Bressette v. Kettle and Stony Point First Nation Band Council, [2004] CHRD No. 26, at paras. 48 and 59

41. To prove retaliation, one must show that the human rights complaint was at least one of the factors that motivated or influenced the negative treatment received by the Complainant. This establishes a *prima facie* case, and the onus then shifts to the Respondent to demonstrate a credible explanation for the adverse treatment.

Warman v. Winnicki, 2006 CHRT 20, at para. 126

Bressette, *supra*, paras. 52, 54 and 60

Chopra v. Canada (Health), 2008 CHRT 39, at para. 244

42. There is a subtle difference in the Tribunal jurisprudence over whether it is necessary to prove that the Respondent intended to cause the complainant harm. The prevailing authorities indicate it is unnecessary to prove specific intent, but rather one must show that a complainant reasonably perceived the conduct to be in retaliation to the human rights complaint. The Tribunal in *Warman* described it this way:

115 Is it necessary to prove that the Respondent intended to cause the Complainant or the victim harm in order to prove retaliation? Some members of this Tribunal are of the view that proof of intent is necessary in retaliation complaints. (see, for example: *Roger Virk v. Bell Canada* (Ontario), [2005] C.H.R.D. No. 2, 2005 CHRT 2 at para. 156). Other members have held that, if a complainant reasonably perceived the impugned conduct to be in retaliation for the laying of a human rights complaint, this could amount to retaliation quite apart from any proven intention of the Respondent (see, for example: *Wong v. Royal Bank of Canada* [2001] C.H.R.D. No. 11 (Q.L.) at para. 222; *Bressette v. Kettle and Stony Point First Nation Band Council*, *supra*, at para.) However, the reasonableness of the complainant's perception must be measured. Respondents should not be held accountable for any unreasonable anxiety or undue reaction of complainants.

116 I am inclined to follow the line of reasoning in *Wong* and *Bressette*. In my view, it is in keeping with the Supreme Court's statement in *Robichaud v. Canada* (Treasury Board), [1987] 2 S.C.R. 84, that the Act is remedial in nature, not punitive, and that therefore, the motives or intention of those who discriminate are not central to the concerns of the Act.

Warman, supra, paras 115-116 and 118

Bressette, supra, paras. 48-49, 52 and 61

43. The Federal Court has held that the *Wong* and *Bressette* line of cases set out the correct view of the law on retaliation and that there is therefore two ways to prove retaliation. According to the Court in *Boiko*,

Under section 14.1 of the Act, there are two ways to establish a retaliation complaint. The first is where there is evidence that the respondent intended the act to serve as retaliation; and the second is where the applicant reasonably perceives the act to be retaliation for the human rights complaint: *Wong v. Royal Bank of Canada*, [2001] C.H.R.D. No. 11 at paragraph 219.

Boiko v. Canada (*National Research Council*), 2010 FC 110 at para. 35

Also see: *Leung v Canada Revenue Agency*, 2008 FC 704 at paras. 29-37

44. The Caring Society submits that the *Wong/Bressette* line of cases reflects the correct legal test and it is unnecessary to prove specific intent to cause harm. However, even according to the more stringent test in *Virk*, the Caring Society submits that retaliation is made out in this case. In *Virk*, the Tribunal holds that it is enough to show that the respondent knew it was acting in “an inopportune way” towards the complainant, and that the complaint was a factor or element in that misbehaviour.

Virk v Bell Canada, 2005 CHRT 2 at para. 158

45. Finally, it must also be recalled that retaliation, like other discriminatory practices, is rarely overt. Tribunals should not expect to see express statements or evidence of intention to discriminate. Rather, the Tribunal must be prepared to draw reasonable inferences from the evidence.

Chopra, supra, para. 243

Present case

46. The Caring Society submits that it has established a *prima facie* case of retaliation by showing that the Respondent behaved in an illegal and “inopportune way” towards the Caring Society’s Executive Director. All of the implicated government officials - or at least those who testified - conceded having knowledge of the complaint. The Respondent’s explanations were, in some cases, demonstrably false and pretextual, and in other cases the complaint was clearly a factor in the unwelcome behaviour.

47. One overarching and telling fact is that the Respondent no longer works with the Caring Society or Dr Blackstock at all. Prior to the complaint being filed, the Caring Society was almost completely funded by the Respondent, and

Dr Blackstock worked very closely with AANDC officials on a regular basis. This all ceased with the filing of the complaint.

48. Another important theme to keep in mind is that the Caring Society's very purpose is providing research and assistance on issues related to First Nations child welfare services. By refusing to work with Dr Blackstock, or even meet with her in different contexts, the Respondent was communicating to others that taking a dissenting or different view on government policies or decisions was unwelcome and would be met with ostracization. First Nations groups undoubtedly received the implicit message that retaining Dr Blackstock for assistance would arouse the displeasure of AANDC/AANDC, and would result in no further communications or negotiations on substantive issues. Worse, the Respondent engaged in this conduct after it had completely cut off the Caring Society's funding, making other relationships or associations crucial for the organization's survival.

(i) BC Working Group

49. There was no good reason to summarily dismiss the idea of the BC Working Group consulting with Dr Blackstock. AANDC witness Linda Stiller merely suggested that Dr Blackstock was "critical" of the Alberta model. Given that the Auditor General of Canada was also "critical" of the Alberta model, and the ostensible purpose of the Group was to develop a BC-specific approach, it was illogical to dismiss out of hand the idea of retaining Dr Blackstock, an expert with a "solid international reputation". Instead, Stiller recommended a former AANDC official from Manitoba who had nowhere near Dr Blackstock's credentials or specific knowledge of BC.

For quote, see Letter from L. Throness to C. Blackstock, dated January 29, 2010 [Exhibit C-1, Tab 11]

50. There can be no other explanation than this was retaliation. Stiller was receiving monthly updates about the human rights complaint and obviously felt that AANDC should not be seen to be doing any kind of business with someone who was now viewed as an adversary. At one point, she even suggested that Dr Blackstock would have a "conflict of interest". Retaliation is established.

(ii) Chiefs of Ontario Meeting

51. The Respondent's explanation for excluding Dr Blackstock from the meeting with the Chiefs of Ontario was that she was not on the list of invitees and that it had a practice of "prior briefing". However, the evidence demonstrated that these explanations were not credible. First, Dr Blackstock was the only person excluded from the meeting, even though many others present were not on the invitee list. The second explanation also carries no weight because Mr McArthur admitted that he did not receive briefings on the invitees who he knew were coming.

Letter from L. Throness to C. Blackstock, dated January 29, 2010
[Exhibit C-1, Tab 11]

52. Mr Phillips and Dr Blackstock also testified to Mr McArthur's tone and demeanour. It was not friendly in any way. That supports the adversarial attitude he had with respect to Dr Blackstock.

53. Based on the foregoing, it is clear that the sole reason for excluding Dr Blackstock was the existence of the human rights complaint. At a bare minimum, it was a factor. Furthermore, directing the security guard to stand watch over Dr Blackstock was unnecessary, demeaning, and retaliatory in and of itself.

(iii) General monitoring

54. The large volume of documents obtained by Dr Blackstock under the *Privacy Act* demonstrated ongoing and systematic monitoring of Dr Blackstock's appearances, speeches and interviews. The monitoring activity was clearly proactive as there was even an occasion where an official noted when Dr Blackstock was not on the agenda at a conference, demonstrating that they were 'keeping an eye out' for her.

Exhibit C-1, Tabs 17, 19 and 20

55. The Respondent only called one witness to address these allegations. Keith Smith only appeared at one of the events in question, even though the documents show reports from dozens of events and appearances. Smith's testimony did not assist the Respondent as he acknowledged being aware of the complaint and that he was not asked to prepare summaries on any other speakers.

56. There was no other attempt to explain the dozens of other monitoring reports. As previously noted, some of the reports even made disrespectful and disparaging remarks about Dr Blackstock. Again, AANDC official Joe Behar derisively referred to "the Cindy Blackstock show", and commented that "she rattled through some general statistics (or gave the impression of doing so) before whisking away to the airport, mission accomplished." And all the evidence clearly shows that AANDC officials did not truly view Dr Blackstock as their "dearest friend".

Email dated October 2, 2009, from J. Behar to several others [Exhibit C-1, Tab 5]

Email dated October 27, 2010 from K. Ford to E. Reza [Exhibit C-1, Tab 19, ATIP page 001025]

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57. There was never any attempt to explain obtaining information from Government of Alberta officials and some kind of spy in Australia. In the absence of evidence, the Tribunal may draw an adverse inference that this monitoring was not for any innocent purpose.

58. Finally, Dr Blackstock testified, and the evidence showed, that reports on her speeches and appearances did not exist prior to the complaint being filed in 2007. Thus, a clear link is established between the monitoring and the complaint. In other words, filing a human rights complaint against the federal government resulted in Dr Blackstock being subjected to systematic and surreptitious monitoring of all her public utterances.

59. The Respondent may attempt to argue that all of this was reasonable in the context of litigation, that it was prudent to collect as much information as possible about a complainant. But it must be remembered that the Caring Society and Dr Blackstock are not making allegations about discriminatory acts against them. They are arguing that thousands of vulnerable First Nations children are the victims of discrimination. In this context, it is hard to understand what relevance Dr Blackstock's activities might have in the circumstances. It was reasonable for Dr Blackstock to perceive this as unwelcome scrutiny as retaliation for a filing a complaint.

(iv) Facebook Creeping

60. The Respondent readily conceded that it was surreptitiously monitoring Dr Blackstock's personal Facebook page for reasons related to the human rights complaint. However, it was never properly explained why this was necessary. The complaint does not in any way relate to Dr Blackstock's personal circumstances, and therefore material on her personal Facebook page would have no arguable relevance. Posting comments and dates regarding the

progress of the case does not make the information relevant, as it does not concern the substantive allegations at issue.

61. There is jurisprudence around the issue of one litigant seeking to gain access to another party's personal Facebook page. But those cases are almost all insurance matters dealing with some form of personal injury or other. In those cases, courts have held that a party must show that there is relevant evidence available on the Facebook page. While this may be easily demonstrated in a personal injury case, it is unfathomable here where Dr Blackstock's personal life is - or should be - irrelevant to the case.

See review of cases in *Rakosi v. State Farm Mutual Automobile Insurance Inc.*, [2012] OFSCD No. 73

62. More disturbing is the evidence that suggests the Respondent was somehow trying to find adverse personal information about Dr Blackstock to discredit her. One AANDC official wrote that monitoring Facebook was important to find out if Dr Blackstock had any "other motives" for pursuing the case. The Respondent's legal counsel also carried out a deeply troubling line of questioning with Dr Blackstock in the jurisdiction motion, asking her about her religion and whether she had been in care as a minor. These kinds of questions were offensive and inappropriate, but demonstrate that the Respondent's overall attitude and approach.

Exhibit R-4

Exhibit C-1, Tab 21

63. This conduct was not only unwelcome, it was unlawful, as confirmed by the Privacy Commissioner of Canada. Furthermore, actively and regularly looking through an individual's personal Facebook page is regarded as disturbing and anti-social behaviour in the world of social media etiquette. This phenomenon is called "creeping". One academic provides a definition:

Something for which Facebook use is particularly notorious, is what has become known as “creeping.” Creeping involves perusing through another user’s profile, including their pictures, wall posts, statuses, etc. The subject of a user’s Facebook creeping may be the user’s friend, but depending on the subject’s privacy settings, he or she may not be the friend of the user who is creeping. All Facebook users, by virtue of signing up for the service are openly inviting creeping to varying degrees, depending on their privacy settings. Essentially, Facebook interaction and communication is not considered creeping, but simply looking through anyone’s Facebook profile is, and it is considered to be especially “creepy” to look through a person’s Facebook profile if he or she is not your friend. Creeping is, for all intents and purposes, undetected monitoring of a user’s Facebook activity.

Keliher, Michael. “Social Networking and the Employment Relationship: Is Your Boss Creeping Up On You?” (August 2012) Thesis submitted in partial fulfillment of Master of Laws at Dalhousie University

Privacy Commissioner Ruling [Exhibit R-12, Tab 48]

64. There was no valid excuse for government officials to be ‘creeping’ Dr Blackstock’s personal Facebook page. It was indeed disturbing, creepy behaviour. Other organizations that may consider bringing human rights complaint may think twice if it means their employees may have their personal lives subjected to this kind of surveillance by the government. According to any standard, it is retaliation contrary to the *CHRA*.

(v) Indian Registration Records

65. There was ultimately insufficient evidence to support the Caring Society’s fear that Dr Blackstock’s Indian Registration records were being accessed in an attempt to find out about her personal life for information to use against her. However, the evidence of Ms Fuijusshot made it clear that the Respondent treated Dr Blackstock differently when it became aware that she had privacy concerns. Ms Fuijusshot failed to document her review, did not contact Dr Blackstock at all, and sent Dr Blackstock’s personal information to

the Privacy Commissioner unsolicited and without lawful consent or authority. Further, Ms Fuijuschoot's testimony clearly showed that she treated Dr Blackstock in that manner because of the human rights complaint.

66. While this allegation might not meet the test of retaliation under *Virk*, it certainly does according to the jurisprudence in *Wong* and *Bressette*. In that regard, it was reasonable for Dr Blackstock to feel that she was treated this way in retaliation for advancing the human rights complaint.

**PART IV
REMEDIES**

67. The Caring Society submits that the Tribunal should declare the retaliation allegations of the complaint are upheld and order the following remedies pursuant to s. 53(2) of the *CHRA*:

- (a) an order obliging AANDC and the Department of Justice to cease its retaliatory conduct towards the Caring Society and its Executive Director, Cindy Blackstock;
- (b) an order directing all AANDC and Justice officials involved in these retaliatory actions to undergo human rights and privacy training; and
- (c) an order directing the Minister of AANDC to issue a written and public apology to Dr Blackstock and the Caring Society.
- (d) \$20,000 in compensatory damages to the Caring Society's choice;

68. The Caring Society submits that the Tribunal should order a further \$20,000 in damages pursuant to s. 53(3) of the *CHRA* for wilful or reckless discriminatory conduct, to be directed to a charity of the Caring Society's choice.

All of which is respectfully submitted on this 2nd day of August, 2013.



Paul Champ
CHAMP & ASSOCIATES
Barristers and Solicitors
Equity Chambers

43 Florence Street
Ottawa, ON K2P 0W6
Phone: (613) 237-4740
Fax: (613) 232-2680
Counsel for the Caring Society